No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

v.

JIM GREER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR THE PETITIONER

HOWARD B. EISENBERG
(Appointed by this Court)
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901
(618) 536-4423
Attorney for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

40pp

QUESTIONS PRESENTED

1. Whether, in a habeas corpus proceedings brought by a state prisoner pursuant to 28 U.S.C. § 2254, the state forfeits the defense of non-exhaustion of state court remedies by failing to raise that issue in the district court.

2. Whether Petitioner exhausted his state court remedies by presenting the issue raised in his federal petition to the state's highest court in an original mandamus action and, in any event, whether further recourse to state courts would be futile under the facts of this case.

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 24-27) is reported as *Granberry* v. *Mizell*, 780 F.2d 14 (7th Cir. 1985). The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing en Banc (J.A. 28) and the order of the district court (J.A. 21) are not reported.

JURISDICTION

The judgment of the Court of Appeals (J.A. 23) was entered on December 26, 1985. The Petition for Rehearing and Suggestion for Rehearing en Banc was denied on February 28, 1986 (J.A. 28). The Petition for a Writ of Certiorari was filed on April 28, 1986 and was granted on October 6, 1986, 107 S.Ct. 62 (J.A. 29). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 28, United States Code

Section 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

. . .

(3) He is in custody in violation of the Constitution or Laws or treaties of the United States;

. . .

Section 2254. State Custody; remedies in Federal Court.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the States, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoners.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

. . .

Constitution of Illinois 1970

Article V, Section 15. Attorney General-Duties

The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.

Illinois Revised Statutes (1985)

Chapter 14, Paragraph 4

The duties of the attorney general shall be—

. . .

Third—To defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this state or the United States.

STATEMENT OF THE CASE

Waldo Granberry (hereinafter referred to as "Petitioner") was convicted in the circuit court of Cook County, Illinois on June 23, 1960 of murder and other offenses, *People* v. *Granberry*, 45 Ill.2d 11, 256 N.E.2d 830 (1970). He remains confined at the minimum security Vienna Correctional Center in southern Illinois serving these sentences. Petitioner has filed several actions contesting the fact that he has been repeatedly denied parole. Specifically, he asserts that the application of statutory parole criteria to his case which were adopted subsequent to the offenses is an *ex post facto* law. In 1981 he petitioned the Illinois Supreme Court to commence an original action for mandamus, asserting that the parole authority improperly applied the new parole criteria to his case. This petition was denied "without prejudice to proceeding in any appropriate circuit court" (J.A. 10), the circuit court being the court of general jurisdiction in Illinois. In 1983 Petitioner commenced a second mandamus action in the Illinois Supreme Court asserting that he was denied his right to due process of law under the United States Constitution because the Illinois parole authorities applied parole criteria to his case which were adopted by the Illinois General Assembly subsequent to his conviction. Petitioner asserted that the application of these parole release criteria to his case operated as an *ex post facto* law. On April 13, 1983 the Illinois court issued the following decision (J.A. 9):

> The portion of the motion by petitioner for leave to file a petition for writ of *mandamus* and for appoint-

ment of counsel is denied. The part of the motion for leave to sue as a poor person is allowed.

On August 10, 1983 Petitioner commenced this action in the United States District Court for the Southern District of Illinois seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He again asserted that the application to his case of parole criteria adopted after the offense and his conviction was an *ex post facto* law. The district court directed the Illinois Attorney General to respond to Granberry's petition (J.A. 11). On August 31, 1983 the Illinois Attorney General filed a Motion to Dismiss the petition for failure to state a claim upon which relief could be granted. The Motion (J.A. 12) and supporting brief (J.A. 13-17) attacked the merits of the petition. No issue concerning exhaustion of state court remedies was raised in the district court by Respondent. On April 10, 1984 the district court, Hon. James L. Foreman, Chief Judge, presiding, entered an Order (J.A. 21) dismissing the action on the merits, relying on the intervening decision of the Court of Appeals in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). Neither the district court nor the magistrate considering this case made any mention of exhaustion of state court remedies in their decisions.

Petitioner appealed, and the Court of Appeals appointed counsel. In his brief in the Seventh Circuit Respondent argued for the first time that Petitioner failed to exhaust state court remedies. Petitioner responded that the most recent Seventh Circuit precedent held that the failure to raise exhaustion in the district court constituted waiver, *Heirens* v. *Mizell*, 729 F.2d 449, 457 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). The Court of Appeals decided that in light of this Court's decision in *Rose* v. *Lundy*, 455 U.S. 509 (1982) it was "required . . . to

consider the issue [of exhaustion] *sua sponte*" (J.A. 25). The panel thus determined that the state had not, and could not, waive the issue of non-exhaustion. The panel concluded that Petitioner had not exhausted state court remedies and remanded the cause to the district court with directions to dismiss the petition for failure to exhaust state court remedies (J.A. 26-27).

Following the denial of Petitioner's request for rehearing and rehearing *en banc* (J.A. 28), he sought certiorari review in this Court. On October 6, 1986 this Court granted Petitioner leave to proceed *in forma pauperis* and granted the Petition for Writ of Certiorari (J.A. 29), 107 S.Ct. 62.

SUMMARY OF ARGUMENT

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. In the district court Respondent filed a Motion to Dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure. The question of non-exhaustion of state court remedies was raised in neither the Motion, supporting brief, nor the order of the district court. On appeal the question of exhaustion was raised in a short concluding section of the state's brief. The United States Court of Appeals found that the state could not waive the question of exhaustion and remanded the case to the district court with directions to dismiss the petition without prejudice for failure to exhaust state court remedies. This Court granted certiorari to resolve a conflict among the circuits on the question of whether the state can waive the exhaustion issue. The merits of the instant petition are not before the Court.

A. 1. This Court has consistently viewed the question of exhaustion of state court remedies in a habeas corpus action filed by a state prisoner to be a question of

comity and not jurisdiction, *Ex parte Royall*, 117 U.S. 241, 251 (1886); *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). When Congress included an exhaustion requirement in 28 U.S.C. § 2254(b), it intended only to codify the existing law and not create a jurisdictional exhaustion requirement.

2. The rule of comity underlying the exhaustion requirement in section 2254 must consider the relationship of all aspects of state and federal governments, not merely the relationship between the state and federal judiciaries. While several circuits have concluded that the interests of comity are concerned solely with judicial relationships, such conclusion is inconsistent with the historical concept of "comity" and state-federal relationships in other areas. Particularly analogous is this Court's decision in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977) holding that the state could waive federal court abstention required by *Younger* v. *Harris*, 401 U.S. 37 (1971). Refusing to allow the Illinois Attorney General to waive exhaustion on behalf of the State fails to recognize his constitutional role in state government. This Court's decision in *Rose* v. *Lundy*, 455 U.S. 509 (1982), relied upon by the court below, did not consider, and does not address, the question of state waiver of the exhaustion requirement.

3. While there is some question of whether a Motion to Dismiss under Rule 12(b)(6), F.R.C.P. is proper in a section 2254 case, the Respondent here clearly forfeited any exhaustion defense by failing to raise the issue in the district court. Such a conclusion is supported both by precedent construing Rule 12(b)(6) as well as this Court's recent decisions requiring a criminal defendant to show "cause" and "prejudice" for failing to raise an issue at the appropriate point in the proceedings, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Smith* v. *Murray*, 106 Sup.Ct. 2661 (1986).

B. 1. By twice seeking relief in the Illinois Supreme Court, Petitioner has exhausted state court remedies. Under Illinois law mandamus is the proper remedy, and under the facts of this case, it was logical and appropriate for Petitioner to seek relief in the state's highest court. Petitioner gave the state courts of Illinois a fair opportunity to consider the issue, and there is no suggestion that the state supreme court denied relief on a procedural basis.

2. A state prisoner is not required to pursue state court remedies when recourse to state court would be futile. The United States Court of Appeals for the Seventh Circuit determined in 1981 that recourse to Illinois courts on the issues raised by this Petitioner would be futile, *Welsh* v. *Mizell*, 668 F.2d 328, 329 (7th Cir. 1982), *cert. den.*, 459 U.S. 923 (1982). This conclusion is reinforced by the fact that the law on the question has come from the Seventh Circuit, and not the state courts.

Petitioner seeks reversal of the judgment of the Court of Appeals and remand with directions to consider the merits of the habeas courpus petition.

ARGUMENT

I

THE STATE FORFEITED THE DEFENSE OF NON-EXHAUSTION OF STATE COURT REMEDIES BY FAILING TO ASSERT SUCH CLAIM IN THE DISTRICT COURT.

A. The Exhaustion Requirement Of Section 2254 Is A Rule Of Comity And Is Not A Jurisdictional Prerequisite.

Congress has given the federal courts broad power to grant habeas corpus relief to any person "in custody in

violation of the Constitution of law or treaties of the United States," 28 U.S.C. § 2241(c)(3). In construing a predecessor of the present statute, this Court recognized that federal courts' power to grant writs of habeas corpus "is of the most comprehensive character, . . . [i]t is impossible to widen this jurisdiction," *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325, 326 (1868). The federal courts' authority to grant relief to state prisoners, first recognized in *McCardle*, is now codified in 28 U.S.C. § 2254 ("section 2254"). Section 2254(b) provides that a federal court shall not grant relief to a state prisoner "unless it appears that the applicant has exhausted the remedies available in the courts of the States." Since jurisdictional requirements can never be waived, *Zipes* v. *Trans World Airlines*, 455 U.S. 385, 397 (1982), it is first necessary to consider whether the exhaustion requirement of section 2254 is jurisdictional. Petitioner submits that the exhaustion requirement is clearly not jurisdictional.

In *Ex parte Royall*, 117 U.S. 241 (1886) this Court reiterated that federal courts have the jurisdictional authority to grant habeas corpus relief to a state prisoner held in violation of the United States Constitution. The Court concluded, however, that the courts of the United States had discretion not to consider the habeas corpus application immediately. JUSTICE HARLAN emphasized that comity between the state and federal governments is an important factor in considering whether a federal court should exercise its discretion to consider a state prisoner's habeas corpus petition:

> That discretion should be exercised in the light of relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally

> bound to guard and protect rights secured by the Constitution.

Id. at 251. The Court concluded that absent "special circumstances" a state prisoner should be "put to his writ of error from the highest court of the State" before the federal court would grant habeas corpus relief, *id.* at 253.

This Court has considered the exhaustion requirement as "not one defining power but one which relates to the appropriate exercise of power," *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). By the time the Judicial Code of 1948 was adopted this Court had made clear that as a "general rule" federal courts should await exhaustion of state court remedies before entertaining a state prisoner's petition, *Darr* v. *Burford*, 339 U.S. 200 (1950); *Ex parte Hawk*, 321 U.S. 114, 116-117 (1944); *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17-19 (1925). This "general rule" was always subject to the recognition that federal courts had the jurisdictional power to grant such relief absent exhaustion and, indeed, should properly exercise such authority under "special circumstances" without requiring exhaustion, *Frisbie* v. *Collins*, 342 U.S. 519, 521-522 (1952).

When Congress adopted section 2254 as part of the Judicial Code of 1948 (Ch. 646, § 2254, 62 Stats, 869, 967 (1948)) it intended to codify the existing law, H.R. Rep. No. 308. 80th Cong. 1st Sess. A180 (1947) ("[t]his new section is declaratory of existing law as affirmed by the Supreme Court"). The adoption of this statute followed the unsuccessful efforts of the Judicial Conference of the United States to persuade Congress to make exhaustion of state court remedies a jurisdictional prerequisite, *see generally*, Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 Ohio St. L.J. 393, 411-412 (1983).

Subsequent to the codification of the exhaustion requirement, this Court reiterated that federal court jurisdiction is conferred in a habeas corpus action by the mere allegation of unconstitutional restraint, and that exhaustion of state court remedies is not a jurisdictional requirement, *Fay* v. *Noia*, 372 U.S. 391, 420, 426 (1963), *in accord*, *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984).

The proposition that the exhaustion requirement of section 2254 is "a matter of comity" and not a jurisdictional rule was stated most recently in *Rose* v. *Lundy*, 455 U.S. 509, 515-520 (1982). In *Rose* JUSTICE O'CONNOR reviewed the development of the exhaustion requirement and concluded that previous decisions of this Court demonstrate that the policy underlying the exhaustion requirement is to "minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," at 455 U.S. 518, citing *Duckworth* v. *Serrano*, 454 U.S. 1,2 (1981) *(per curiam)*.

Petitioner submits that the current exhaustion requirement is a codification of a rule of comity adopted by this Court a century ago in *Royall*. The intervening cases have consistently reaffirmed the exhaustion requirement as a matter of comity, and not as a matter of jurisdiction. There is no basis to deviate from this principle in the case at bar.

B. The Rule Of Comity Implicates The Entire State-Federal Relationship, Not Merely The Concurrent Jurisdictions Of The Courts.

1. The Circuits Are Divided On The Question Of Whether Comity Looks Only To The Relationship Between Courts Or Relationship Between Sovereigns.

The question of whether the exhaustion requirement can be waived by the state has divided the circuits and has

even resulted in inconsistent decisions within circuits. In this case, for example, the Seventh Circuit held that it was obligated to consider the exhaustion question even in the presence of an explicit waiver by the state (J.A. 25). The panel relied upon two earlier decisions of that court on the question, *United States ex rel. Lockett* v. *Illinois Parole and Pardon Bd.*, 600 F.2d 116 (7th Cir. 1979); *Mattes* v. *Gagnon*, 700 F.2d 1096 (7th Cir. 1983). In 1984, however, the same court ruled that the failure to raise exhaustion in the district court constituted waiver, *Heirens* v. *Mizell*, 729 F.2d 449, 457 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). Moreover, in two cases decided after the instant case, the Seventh Circuit found that it was not required to reach the exhaustion question *sua sponte*, *United States ex rel. Russo* v. *Attorney General of Illinois*, 780 F.2d 712, 714 n.1 (7th Cir. 1986), *cert. den.*, 106 S.Ct. 2922 (1986); *Mosley* v. *Moran*, 798 F.2d 182, 184 (7th Cir. 1986).

Division among the circuits is predicated upon the question of whether the doctrine of comity relates only to the relationship of federal courts to state courts, or whether comity implicates broader intergovernmental relationships. Those circuits which have found that exhaustion may not be waived by the state have considered exhaustion solely a matter of judicial relationships. This position is exemplified by the Third Circuit's decision in *United States ex rel. Trantino* v. *Hatrack*, 563 F.2d 86, 96 (3rd Cir. 1977), *cert. den.*, 435 U.S. 928 (1978):

> Exhaustion is a rule of comity. "Comity," in this context, is that measure of deference and consideration that the federal judiciary must afford to the co-equal judicial systems of the various states. Exhaustion, then, serves an interest *not* of state prosecutors but state courts. It follows, therefore, that the state court interest which underlies the exhaustion requirement of § 2254(b) *cannot* be conceded or

> waived by state prosecutors—for the state court interest in having "an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" is simply not an interest that state prosecutors have been empowered to yield. (Original emphasis, footnote omitted).

This position is supported by decisions of the First, Sixth, Ninth, and Tenth circuits, *Needel* v. *Scafati*, 412 F.2d 761, 766 (1st Cir. 1969), *cert. den.*, 396 U.S. 861 (1969); *Bowen* v. *Tennessee*, 698 F.2d 241, 242-243 (6th Cir. 1983) *(en banc), but see, Steele* v. *Taylor*, 684 F.2d 1193, 1206 (6th Cir. 1982), *cert. den.*, 460 U.S. 1053 (1983) (recognizing state's waiver of *Rose* v. *Lundy* objection to mixed petition); *Batchelor* v. *Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. den.*, 463 U.S. 1212 (1983); *Naranjo* v. *Ricketts*, 696 F.2d 83, 87 (10th Cir. 1982).

The view that comity is concerned only with relations between federal courts and those of the state has been rejected by at least four other circuits. In *Thompson* v. *Wainwright*, 714 F.2d 1495 (11th Cir. 1983), *cert. den.*, 466 U.S. 962 (1984) the court concluded that:

> Comity, as reflected in Sec. 2254, undoubtedly promotes the interests of state courts, but this is merely one aspect of comity's broader purpose of maximizing the control that a sovereign state has over its criminal justice system.

The court went on to determine that the state's attorney general had significant interest in the administration of justice in both the state and federal courts and that "[c]omity requires sensitivity, not indifference, to the full spectrum of state interests implicated by federal-state habeas review," *id.*

In *McGee* v. *Estelle*, 722 F.2d 1206 (5th Cir. 1984) *(en banc)*, the court was faced with a case in which the

attorney general stated in the district court that he "believed" petitioner had exhausted his state court remedies. While exhaustion was not raised by the state on appeal, the panel remanded the case with directions to dismiss for failure to exhaust, 704 F.2d 764, 768 (5th Cir. 1983). On rehearing *en banc* the Fifth Circuit found that the state had waived the exhaustion question. Following the Eleventh Circuit's decision in *Thompson*, the Fifth Circuit adopted a broad view of comity and the waiver of the exhaustion question:

> The doctrine of comity arises from the nature of our federal system, the joinder of sovereign states into a single union. Mutual respect among sovereigns for the legislative, executive, or judicial acts of each other constitutes the heart of the doctrine. Considerations of finality, avoiding piecemeal litigation, and preventing disruption of custody also support comity. It would pervert these principles to require a state, in the name of comity, unwilling to endure the expense and delay of a remand to state court if the federal constitution question must ultimately be resolved in a federal forum.

McGee, at 722 F.2d 1210-1211 (footnotes omitted). As one judge has said, "[r]efusing a state the right to waive a benefit conferred in deference to its sovereignty stands sovereignty on its head," *Felder* v. *Estelle*, 693 F.2d 549, 554 (5th Cir. 1982) (Higginbotham, J., concurring). This position finds additional support in decisions of the Fourth and Eighth circuits, *Jenkins* v. *Fitzberger*, 440 F.2d 1188, 1189 (4th Cir. 1971); *Purnell* v. *Missouri Dept. of Corrections*, 753 F.2d 703, 708-710 (8th Cir. 1985); *Kuntzelman* v. *Black*, 774 F.2d 291 (8th Cir. 1985), *cert. den.*, 106 S.Ct. 1474 (1986).

The Second Circuit, like the Seventh, has not spoken with one voice on the exhaustion question. At times the

court has precluded waiver, *United States ex rel. Sostre* v. *Festa*, 513 F.2d 1313, 1314, n.1 (2nd Cir. 1975), *cert. den.*, 423 U.S. 341 (1975); *Gayle* v. *LeFevre*, 613 F.2d 21, 22, n.1 (2nd Cir. 1980), while at other times finding the question of exhaustion to be subject to waiver, *Colon* v. *Fogg*, 603 F.2d 403, 407 (2nd Cir. 1979), *McCarthy* v. *Manson*, 714 F.2d 234, 238 (2nd Cir. 1983) (waiver based in part on unique role of Vermont's Chief State's Attorney under the supervision of the judiciary).

2. There Is No Reasoned Basis For Limiting Comity To Solely An Issue Of Relationships Between Courts.

"The language, structure, legislative history, and pre-Code background of the exhaustion requirement lend virtually no support to the proposition that the requirement was intended to be a limitation on the jurisdiction of the federal courts that cannot be waived, forfeited, or conceded," Note, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. Chi. L. Rev. 354, 363-364 (1983). The term "comity" was borrowed from international law, where it was not limited to the relationship between judges. Indeed, in considering "comity" in the context of international law, this Court has explicitly defined the concept to mean "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our great est jurists have been content to call 'the comity of nations,'" *Hilton* v. *Guyot*, 159 U.S. 113, 163, (1895), *see also*, *United States ex rel. Trantino* v. *Hatrack*, 563 F.2d at 103 (Gibbons, J. dissenting). Clearly, the original notion of "comity" extended to the action of the executive and legislative branches of government, and was not limited to the relationship among judges.

In dealing with other cases involving "comity" this Court has not looked merely to judicial relationships. In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) state prisoners brought a civil rights action under 42 U.S.C. § 1983 seeking to restore good time credits. This Court concluded that restoration of good time, which would reduce the duration of confinement, could only be brought in federal court in a section 2254 habeas corpus action after exhaustion of state remedies. The prisoners argued that the exhaustion requirements of section 2254(b) should apply only when the challenge was to state *court* action, citing the very cases relied upon by those circuits which have found the exhaustion requirement to be a rule relating solely to judicial relationships, Brief for Respondents, at 12-14, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). This Court rejected such a narrow view of comity:

> The rule of exhaustion in federal habeas corpus action is rooted in considerations of federal-state comity. That principle was defined in Younger v. Harris, 401 U.S. 37, 44, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), as "a proper respect for state functions," and it has as much relevance in areas of particular state administrative concerns as it does where state judicial action is being attacked.

Id. at 491.

In a later case, involving abstention under *Younger*, the state had urged abstention in the district court, but failed to raise the issue on appeal. The Court concluded that "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system," *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977). This same rational should apply to the exhaustion requirement found in section 2254, *Felder* v. *Estelle*,

693 F.2d 549, 553-554 (5th Cir. 1982); 17 Wright & Miller, *Federal Practice and Procedure*, § 4264, at 654.

3. Allowing The State To Waive Exhaustion Is Consistent With Decisions Of This Court In Analogous Areas Of The Law.

Petitioner further submits that allowing for waiver of the exhaustion question by the state's attorney general is consistent with decisions of this Court allowing waiver in analogous areas. As noted above, in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977) this Court allowed the State to waive the judicially created abstention doctrine adopted in *Younger* v. *Harris*, 401 U.S. 37 (1971) to prevent conflict between the state and federal governments.

Similarly, the Court has recognized that the Eleventh Amendment's prohibition against federal courts from hearing private suits against state government "is a personal privilege which it may waive at pleasure," *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883); *see also*, *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186 (1964); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 465 (1945); *Missouri* v. *Fiske*, 290 U.S. 18, 24 (1933).

In *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) the Court was concerned with the question of exhaustion of administrative remedies by Social Security claimants. Notwithstanding the fact that exhaustion of administrative remedies was a prerequisite to federal court jurisdiction in Social Security cases, this Court determined that the Secretary of the Department of Health, Education, and Welfare could waive the exhaustion requirement. *See also*, *Mathews* v. *Diaz*, 426 U.S. 67, 76 (1976). In cases which involve other than jurisdictional questions, lower courts have regarded exhaustion of

administrative remedies as subject to government waiver, *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1033-1034 (5th Cir. 1982); *Dougherty* v. *Bell*, 694 F.2d 78, 80 (5th Cir. 1982); *Mitchell* v. *United States*, 229 Ct.Cl. 1, 664 F.2d 265, 276 (Ct.Cl. 1981), *aff'd.*, 463 U.S. 206 (1983). Finally, this Court has indicated that the federal government may waive venue, *Panhandle E. Pipe Line Co.* v. *Federal Power Comm'n.*, 324 U.S. 635, 639 (1945)

These cases all support the proposition that counsel for the state or federal government can waive a right or defense, particularly those rights which were intended to protect the state or federal government from premature intervention of the federal judiciary. While the early cases of this Court do include language referring to comity as the relationship among courts, there is no indication that such precedent was intended to mean that exhaustion of state court remedies applied only to action by the state judiciary. The origins of the comity doctrine as well as its application by this Court in other areas of the law clearly repudiate the contention that comity is limited to merely the question of concurrent jurisdiction of state and federal courts.

4. Prohibiting The Illinois Attorney General From Waiving Exhaustion Of State Court Remedies Fails To Recognize His Authority Under Illinois Law.

The Respondent in this case has at all times been represented by the Attorney General of Illinois. In Illinois the Attorney General is a constitutional officer, Constitution of Illinois 1970, Article V, § 15. He is given plenary authority by the Illinois General Assembly to represent the state and its officers, Illinois Revised Statutes (1985), Chapter 14, Para. 4. Unlike the justices of the Illinois Supreme Court, the Attorney General is elected on a

statewide basis. It is he who represents state officials in *both* state and federal courts. It is his office that is aware of the developing law in the area of inmates' rights, criminal procedure, and civil rights. As the Fifth Circuit noted in *McGee* v. *Estelle*, 722 F.2d 1206, 1212 (5th Cir. 1984) (*en banc*):

> As the chief legal officer of the state, the attorney general is the appropriate person to assert, or to waive, the state's right first to determine a claim that the state is holding a person in custody in violation of his federal constitutional rights.

As will be developed in the subsequent sections of this Brief, the Attorney General recognized that this case was governed by federal precedent, and that it could, and should, be most expeditiously resolved in the federal courts. He did not raise an exhaustion claim in the district court and raised the issue only in the closing two pages of his brief in the Seventh Circuit, after he had extensively briefed the merits of this case. The Attorney General made a rational strategic decision in this case not to raise the exhaustion question in the district court. Viewing comity without reference to the authority and role of the Illinois Attorney General seriously denigrates his constitutional authority and unnecessarily increases the friction between the state and federal governments. Such lack of deference to the Attorney General's strategic decision in thus inconsistent with the application of the comity principles expressed in *Rose* v. *Lundy*, 455 U.S. at 518.

5. Nothing In This Court's Decision In *Rose* v. *Lundy* Precludes State Waiver Of The Exhaustion Requirement.

The Court of Appeals concluded that this Court's decision in *Rose* v. *Lundy*, 455 U.S. 509 (1982) requires a federal court to make a *sua sponte* determination of

exhaustion and to dismiss the petition if it finds a lack of exhaustion. Petitioner submits that no such requirement was suggested or intended in *Rose*. Indeed, the Court of Appeals seems to have read *Rose* to elevate the concept of exhaustion to a jurisdictional requirement. As Petitioner has shown in the initial section of this Brief, this is clearly not the law. Indeed, in *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984), a case decided after *Rose*, this Court reinterated that the exhaustion requirement of section 2254 is not jurisdictional.

In *Rose* the Court adopted a "total exhaustion" rule whereby the district court was required to dismiss without prejudice a 2254 petition if it contained both exhausted and unexhausted claims. In *Rose* the state vigorously pressed the exhaustion question. Obviously, no question of waiver was presented in that case. In fact, the Fifth Circuit has held that "waiver by a state of exhaustion arguably removes from a mixed petition the defect which *Rose* v. *Lundy* forbids," *Burns* v. *Estelle*, 695 F.2d 847, 853 n. 2 (5th Cir. 1983). The Sixth Circuit, while generally holding that the exhaustion requirement can not be waived, has held that under *Rose* the state can waive exhaustion by failing to object to a mixed petition in the district court, *Steele* v. *Taylor*, 684 F.2d 1193, 1206 (6th Cir. 1982), *cert. den.*, 460 U.S. 1053 (1983).

In *Rose* JUSTICE O'CONNOR reiterated the familiar policies for exhaustion including affording the "opportunity to the state courts to correct a constitutional violation," at 455 U.S. 518, *citing*, *Darr* v. *Burford*, 339 U.S. 200, 204 (1950). The Fifth and Eleventh Circuits read this language in *Rose* to authorize state waiver of exhaustion, *McGee* v. *Estelle*, 722 F.2d at 1212; *Thompson* v. *Wainwright*, 714 F.2d at 1505.

Petitioner submits that *Rose* simply does not speak to the question of waiver. It is helpful to the instant discussion only to the extent it reformulates the basic question. Under *Rose* the question becomes how the state's "opportunity" to exercise state court jurisdiction need be decided. Must state courts be given that "opportunity," or may the state's elected attorney general determine that the state's best interests are served by litigating the issue in federal court. Petitioner respectfully submits that the Court of Appeals read into *Rose* a rule forbidding waiver of exhaustion that is contained neither in the language of the Court's opinion nor was fairly presented by the facts of that case.

C. Respondent Has Forfeited Any Exhaustion Defense By Failing To Assert Such Claim In The District Court.

1. Respondent Should Be Bound By His Failure To Raise Exhaustion In The District Court.

In the district court the Attorney General of Illinois did not expressly waive nor concede exhaustion of state court remedies. In response to the Order to Show Case (J.A. 11) the Attorney General filed a Motion to Dismiss (J.A. 12) going to the merits of the petition and made no reference to exhaustion in either the Motion or his supporting brief (J.A. 13-17). There is a question of whether the State's Motion to Dismiss is an appropriate pleading in view of Rule 5 of the Rules Governing 28 U.S.C. Section 2254 Proceedings ("Rule 5"') which requires that the respondent "state whether the petitioner has exhausted his state remedies." Several courts have held that the failure to mention exhaustion in the state's responsive pleading coupled with a request to deny relief on the merits constitutes waiver of the exhaustion issue, *Pennington* v. *Spears*, 779 F.2d 1505, 1506 (11th Cir. 1986); *Truitt* v. *Jones*, 614 F.Supp. 1342, 1346 (S.D. Ga. 1985), *aff'd*, 791 F.2d 940 (11th Cir. 1986); *see also*, *Goins* v. *Allwood*, 391 F.2d 692, 693 (5th Cir. 1968) (under predecessor statute). Petitioner submits that by the Respondent's failure to raise exhaustion in his "Motion to Dismiss" and by requesting the district court to dispose of the merits of the petition the exhaustion issue has been forfeited by the State.

The circuits are divided on the question of whether the state's failure to raise exhaustion in the district court constitutes waiver[1] of the defense. Some courts have found that even though the prosecutor failed to raise the claim, it could be considered, *Strader* v. *Allsbrook*, 656 F.2d 67, 68 (4th Cir. 1981); *Campbell* v. *Crist*, 647 F.2d 956, 957 (9th Cir. 1981); *Gayle* v. *LeFevre*, 613 F.2d 21, 22, n. 1 (2nd Cir. 1980); *Davis* v. *Campbell*, 608 F.2d 317, 320 (8th Cir. 1979). Other courts have found that by failing to assert the exhaustion claim in a timely manner, it was waived, *Shaw* v. *Boney*, 695 F.2d 528, 529 n. 1 (11th Cir. 1983); *Hopkins* v. *Jarvis*, 648 F.2d 981, 983 n. 2 (5th Cir. 1981); *Messelt* v. *Alabama*, 595 F.2d 247, 250-251 (5th Cir. 1979); *United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463, 467 (2nd Cir. 1972). Commentators are also divided on the question, at least one taking the position that the failure of the state to raise exhaustion should not be

---

[1] The issue here is not truly one of "waiver," which requires "an intentional relinquishment or abandonment of a known right," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), but of stage preclusion which "demands that a right be asserted during the stage to which it is most relevant," Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. Rev. 478, 514-515 (1981). This "waiver" is often considered a "forfeiture," Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

presumed to be waiver, Note, *State Waiver of the Exhaustion Requirement in Habeas Corpus Cases*, 52 Geo. Wash. L. Rev. 419, 431 (1984), while others argue that such default constitutes forfeiture of the issue, Yackle, *Postconviction Remedies* 238 (1981); Note, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, at 377-378.

In the instant case it is apparent why Respondent decided not to assert non-exhaustion in the district court, but to seek disposition of the petition on the merits. First, the governing precedent at the time the state filed its response on the merits of the petition was a decision of the Seventh Circuit, *Welsh* v. *Mizell*, 668 F.2d 328 (7th Cir. 1982), *cert. den.*, 459 U.S. 923 (1982). Secondly, the Petitioner had twice sought relief from the Illinois Supreme Court. Thirdly, the district courts in Illinois had already resolved the issue raised in this case against Petitioner, *see*, Brief in Support of Motion to Dismiss, (J.A. 14-16). Finally, Petitioner was not represented by counsel, and it appeared that the case could be quickly disposed of.

The action of the Attorney General in this case was neither ambiguous, erroneous, nor inadvertent, cf. *Davis* v. *Campbell*, 608 F.2d 317, 320 (8th Cir. 1979). His Motion to Dismiss plainly asked the district court to consider and reject the merits of the petition. It was only when the Court of Appeals appointed counsel who raised at least a colorable argument on the merits[2] that the Attorney General reconsidered his decision not to raise an exhaustion defense. This was too late. Counsel made a rational strategic decision not to raise the exhaustion issue, and Respondent should be bound by that decision.

[2] Although the merits of the habeas corpus are not before the Court, Respondent argued in his Brief in Opposition to certiorari that the Petitioner could not prevail on the merits. Petitioner strongly contends that the Seventh Circuit's decision in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984), overruling *Welsh* v. *Mizell*, 668 F.2d 328 (7th Cir. 1981), was incorrect. He believes that if afforded the opportunity, he can demonstrate that the statute changing the parole criteria is an *ex post facto* law as applied to him.

2. Respondent Conceded Exhaustion Of State Court Remedies By Filing A Motion To Dismiss Under Rule 12(b)(6), F.R.C.P.

Respondent alleged in his Motion to Dismiss that Petitioner failed to state a claim upon which relief may be granted and that pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure (F.R.C.P.), this action should be dismissed (J.A. 12).

Rule 81(a)(2), F.R.C.P., provides that the Rules are applicable to habeas corpus proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." In *Harris* v. *Nelson*, 394 U.S. 286 (1969) the Court held that civil discovery rules were not applicable in habeas corpus proceedings, and that separate rules governing 2254 actions "would promise much benefit," 394 U.S. at 300, 301, n. 7. Such separate rules were promulgated in 1976 and as amended by Congress, were enacted effective February 1, 1977, Pub. L. 94-426, 90 Stat. 1334 (1976). Given the adoption of such separate rules, "it may be doubted that in cases covered by Section 2254 . . . the 'conformity' provisions in Rule 81(a)(2) has any continuing significance," 7 *Moore's Federal Practice*, ¶81.04[4] at 81-54. *See also*, *Pitchess* v. *Davis*, 421 U.S. 482 (1975) (holding that Rule 60(b), F.R.C.P., providing for relief from judgment, does not apply in a section 2254 habeas corpus action).

The application of the Federal Rules of Civil Procedure to section 2254 cases is nevertheless unclear. In *Blackledge* v. *Allison*, 431 U.S. 63 (1977) the Court determined

that a motion for summary judgment under Rule 56, F.R.C.P. was proper in a 2254 cases, while in *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 272 (1978) (Blackmun, J. concurring) there is the suggestion that Rule 60, F.R.C.P. also applies in section 2254 cases. At least one court has found "the application of Federal Rules of Civil Procedure to habeas cases is a persistent and perplexing problem," *Hillery* v. *Pulley*, 553 F.Supp. 1189, 1196 (E.D. Calif. 1982).

If this matter were in the district court, Petitioner would move to strike the 12(b)(6) motion filed by Respondent as being inconsistent with Rule 5 of the Section 2254 rules, and thereby not applicable to habeas corpus cases under the incorporation language of Rule 81(a)(2), F.R.C.P. Once such a motion has been filed and accepted by the district court, however, the allegations of the petition should be construed favorably to the pleader, *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), and its allegations taken as true, *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-422 (1969). Petitioner clearly alleged in his pleading that he had exhausted state court remedies (J.A. 5-6). Thus by filing a 12(b)(6) motion, Respondent conceded exhaustion just as much as if he had specifically and explicitly waived the issue.

While Petitioner believes that a 12(b)(6) motion does not lie in a section 2254 case, the failure of Respondent to file a answer which complies with Rule 5 should not delay disposition of this case at this juncture in the proceedings. By any account, the manner in which the Respondent replied to the petition is a waiver of the exhaustion question.

3. Requiring A State Attorney General To Raise The Issue Of Non-Exhaustion Of State Remedies In The District Court Is Most Consistent With Decisions Of This Court Holding Criminal Defendants Bound By The Procedural Defaults Of Their Attorneys.

In the past decade, beginning with *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), this Court has foreclosed federal habeas corpus review of a criminal conviction in which the defendant has failed to take some required action at a more preliminary stage in the proceedings, unless the petitioner can show "cause" for the default as well as any "prejudice" attributable thereto, *see also*, *Engle* v. *Isaac*, 456 U.S. 107 (1982) and *Francis* v. *Henderson*, 425 U.S. 536 (1976). This line of cases culminated last term in the decisions in *Murray* v. *Carrier*, 106 S.Ct. 2639 (1986) and *Smith* v. *Murray*, 106 S.Ct. 2661 (1986) wherein this Court concluded that neither the inadvertence nor tactical decision of counsel would relieve a criminal defendant of the procedural default resulting from the attorney's failure to take action at the appropriate stage in the proceedings.

Here the Illinois Attorney failed to comply with Rule 5 of the Rules Relating to 2254 Actions. He failed to raise non-exhaustion in either his Motion to Dismiss or supporting brief in the district court. Petitioner submits that the Attorney General of Illinois should be required to meet the same standards of showing "cause" and "prejudice" for his procedural default as would a criminal defendant under the line of cases cited above. The petitioner in *Smith* v. *Murray* was sentenced to death, but he was nevertheless precluded from obtaining complete review of his conviction and sentence due to the inadvertence of his appellate attorney. It would certainly seem reasonable and fair to require the attorneys who represent the State of Illinois in criminal post-conviction pro-

ceedings to meet the same standards as defense attorneys who may have only very limited experience in criminal law, e.g. *United States* v. *Cronic*, 466 U.S. 648 (1984).

Here Respondent manifestly failed to raise the exhaustion issue at the time specified by Rule 5. If a habeas petitioner had failed to raise a constitutional claim in the district court, he would have been barred from raising the claim on appeal, cf. *Dorszynski* v. *United States*, 418 U.S. 424, 431 n. 7 (1974); *Irvine* v. *California*, 347 U.S. 128, 129-130 (1954) (Court need not consider issues not raised in certiorari petition). Petitioner submits that equal application of the "cause" and "prejudice" requirement mandates reversal of the decision of the Court of Appeals.

The exhaustion requirement found in section 2254(b) is a non-jurisdictional rule of comity. The valid concerns of the relationship between the state and federal governments are adequately addressed when the state's constitutional officer, the Attorney General, decides not to contest state court consideration of a state prisoner's habeas corpus petition. The state should be bound by the same rules of pleading, practice, and forfeiture as any other litigant in the federal courts. All of these factors point to but one result: the issue of exhaustion of state court remedies under section 2254(b) may be, and was in this case, forfeited by Respondent.

II

PETITIONER HAS EXHAUSTED HIS STATE COURT REMEDIES AND, IN ANY EVENT, FURTHER RECOURSE TO THE STATE COURTS OF ILLINOIS WOULD BE FUTILE IN THIS CASE.

A. Petitioner Has Exhausted His State Court Remedies.

Under Illinois law mandamus is the proper remedy for attacking the denial of parole, *People ex rel. Abner* v.

Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964). Petitioner has twice addressed a mandamus request to the Illinois Supreme Court. In 1981 Petitioner and other inmates at the Vienna Correctional Center filed an action contesting the application of the new parole criteria to them, *People ex rel. Long* v. *Irving*, No. 7023 (Ill. Oct. 30, 1981). That action was denied without prejudice to refiling the action in the state court of general jurisdiction (J.A. 10). In 1983 Petitioner attempted to commence a second mandamus action in the Illinois Supreme Court. In that case the court granted Petitioner leave to sue as a poor person, but denied Petitioner leave to file a petition for writ of mandamus and for appointment of counsel, *People ex rel. Granberry* v. *Illinois Prison Review Board*, No. 7145 (Ill. April 13, 1983) (J.A. 9). In the latter order there was no suggestion that the relief was denied on some procedural grounds, and, unlike the 1981 order, there was no suggestion that Petitioner should seek relief in the trial court. This action was filed several months after the Illinois Supreme Court's second order.

It is important to understand why Petitioner would address an original petition to the state's highest court. The Fifth District of the Illinois Appellate Court has jurisdiction over Johnson County in which Petitioner is confined. In 1980 that court specifically rejected the *ex post facto* argument advanced by Petitioner, *Harris* v. *Irving*, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980). The Illinois Supreme Court denied discretionary review of the Appellate Court's decision, *leave to appeal denied*, No. 54264 (Ill. Jan. 30, 1981), 82 Ill.2d 584 (1981). Since in Illinois the opinions of the Appellate Court are binding on all state circuit courts, *People* v. *Foote*, 104 Ill.App.3d 581, 432 N.E.2d 1254, 1257 (1st Dist. 1982), it was clear that Petitioner was foreclosed from obtaining relief in either

the circuit or appellate court having jurisdiction over his claim. If he was going to obtain relief from any Illinois court, it was going to have to come from the state supreme court.

In order to exhaust state court remedies, all a state prisoner must do is fairly present his claims to the state courts, *Picard* v. *Conner*, 404 U.S. 270, 275 (1971); there is no requirement that the state court address the merits of the claim, *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978). Here Petitioner twice requested that the Illinois Supreme Court assume jurisdiction of the matter. Each time the court refused.

In concluding that Petitioner had not exhausted his state court remedies, the Seventh Circuit relied on *United States ex rel. Johnson* v. *Mcginnis*, 734 F.2d 1193 (7th Cir. 1984), a case in which the petitioner failed to seek the proper remedy in the state courts. Clearly, this failure is the dispositive distinction between *Johnson* and the case at bar. Here Petitioner twice pursued the correct remedy in state courts, while in the case relied upon by Respondent and cited by the Court of Appeals no such applications were filed. In *Johnson* there was clearly no exhaustion; here there was.

Secondly, the court below incorrectly stated that the Illinois Supreme Court had directed the Petitioner to seek relief in the circuit court (J.A. 27). The language quoted by the Seventh Circuit appeared not in the 1983 order of the Illinois Supreme Court (J.A. 9), but in the 1981 order (J.A. 10). The governing writ should obviously be the latest action of the state supreme court which includes no suggestion of other remedies or other courts.

There is no indication that the Illinois Supreme Court denied relief on any procedural basis whatsoever. While it

is true, of course, that a state prisoner does not exhaust state remedies by pursuing the wrong procedural remedy, *Williams* v. *Wyrick*, 763 F.2d 363 (8th Cir. 1985) (motion to recall mandate not proper procedure to evaluate prisoner's constitutional claims), here there is no question but that Granberry pursued the correct remedy. Absent a showing on the record that the state court denied relief on procedural grounds, this Court should presume denial on the merits, *Bell* v. *Watkins*, 692 F.2d 999, 1006 (5th Cir. 1982), *cert. den.*, 464 U.S. 843 (1982); *Ross* v. *Craven*, 478 F.2d 240, 241 (9th Cir. 1973); *Castro* v. *Klinger*, 373 F.2d 847, 848 (9th Cir. 1967).

In this case Petitioner pursued the correct remedy in the appropriate court, and that court denied relief on the merits. The Court of Appeals erred in concluding that Petitioner had not exhausted his state court remedies.

B. Further Recourse To The State Courts Of Illinois Would Be Futile.

A state prisoner is not required to pursue state court remedies for the purposes of exhaustion under section 2254 if recourse to state court would be futile, *Duckworth* v. *Serrano*, 454 U.S. 1, 3 (1981); *United States ex rel. Buckhana* v. *Lane*, 787 F.2d 230, 235 (7th Cir. 1986); *Brand* v. *Lewis*, 784 F.2d 1515, 1517 (11th Cir. 1986); *Allen* v. *Perini*, 424 F.2d 134, 139 (6th Cir. 1970), *cert. den.*, 400 U.S. 906 (1970).

Ironically, five years ago the United States Court of Appeals for the Seventh Circuit found that it was futile for an Illinois prisoner to raise this precise issue in state court, *Welsh* v. *Mizell*, 668 F.2d 328, 329 (7th Cir. 1982), *cert. den.*, 459 U.S. 923 (1982). The panel in the present case made no reference to the determination of futility in *Welsh*.

Manifestly, recourse to Illinois courts would be futile. As noted in the preceding section of this Brief, the appellate court with jurisdiction over Petitioner has resolved this case against him, thus barring relief in any Illinois court other than the state supreme court. More importantly, this is a case in which the definitive precedent has come from the United States Court of Appeals for the Seventh Circuit. In *Welsh* that court held the retroactive application of statutory parole criteria to be an *ex post facto* law. Subsequently the court overruled *Welsh* in *Heirens* v. *Mizell*, 729 F.2d 449 (7th Cir. 1984), *cert. den.*, 469 U.S. 842 (1984). Thus even if the Illinois Supreme Court were inclined to consider the matter, it would be faced with direct precedent from the Seventh Circuit on the issue. In light of the adverse determination of the state appellate court, the disinclination of the Illinois Supreme Court to hear the various cases raising this issue, and the fact that the law on this question has come from the federal, and not state, courts, it would surely be an exercise in futility to require the Petitioner to file his third mandamus action in an Illinois court.

CONCLUSION

Petitioner has shown in this Brief that Respondent forfeited his right to contest non-exhaustion of state court remedies by failing to raise that issue in the district court. Even if this Court concludes that there was no waiver of the issue, however, it is apparent that Petitioner has, in fact, exhausted his state court remedies and that further recourse to Illinois courts would be futile.

For the reasons specified herein, Petitioner respectfully prays that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and the cause remanded with directions to consider the merits of the petition for writ of habeas corpus.

Respectfully submitted,

HOWARD B. EISENBERG
(Appointed by this Court)
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901
(618) 536-4423
Attorney for Petitioner